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No. 92-1309

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHARLES MCFERREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Ex Post Facto Clause barred the district court from resentencing petitioner five days after the initial sentence was imposed, where the original sentence structure did not conform to the terms of a plea agreement.

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OPINION BELOW

The judgment of the court of appeals (Pet. App. 14) is unreported but is noted at 955 F.2d 45 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1992. A petition for rehearing was denied on April 2, 1992, for lack of timeliness. On April 24, 1992, the court of appeals denied a motion to reconsider the order denying the petition for rehearing. The petition for a writ of certiorari was filed on June 17, 1992, and is therefore untimely under Rule 13.1 and Rule 13.4 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner and six co-defendants were charged with violations of federal drug, firearms, and tax laws in a 41-count indictment filed in the United States District Court for the Eastern District of Michigan. Petitioner was named in 35 of the counts. Pet. C.A. Br. 1.

Pursuant to a plea agreement, petitioner pleaded guilty to three counts of the indictment: Count 1 (conspiracy to distribute more than 500 grams of cocaine, in violation of 21 U.S.C. 846), Count 32 (possession of firearms by a convicted felon, in violation of 18 U.S.C. 922(g)), and Count 36 (income tax evasion, in violation of 26 U.S.C. 7201). In exchange for the guilty pleas, the plea agreement provided that the remaining counts would be dismissed, the term of imprisonment would not exceed 12 years, and the sentences on each count would run concurrently. The crimes charged in Counts 1 and 36 occurred prior to the effective date of the Sentencing Guidelines (November 1, 1987), and petitioner was to be sentenced on those counts under the parole provisions of 18 U.S.C. 4205(b)(1). The crime charged in Count 32, however, occurred after the effective date of the Guidelines, and petitioner was accordingly to be sentenced on that count under the Guidelines. The Guidelines range for that offense was 21-27 months' imprisonment. The court accepted the plea agreement. Gov't C.A. Br. 2-3.

Petitioner initially appeared for sentencing on January 17, 1991. The judge sentenced him to consecutive terms of imprisonment of seven years on Count 1 and five years on Count 32, and a concurrent 27-month prison term on Count 36. Although the

total 12-year sentence was in accord with the plea agreement, the sentence did not comport with the agreement in all respects, because the terms of imprisonment were not all concurrent. In addition, the court apparently erred in transposing the sentences for Counts 32 and 36 by imposing a five-year sentence on Count 32, which should have been a Guidelines sentence in the 27-36 month range, and imposing a 27-month sentence on Count 36, for which the maximum penalty was five years. Finally, the court neglected to impose the 2-3 year term of supervised release required under the Guidelines. Petitioner was ordered to begin serving the sentence without delay. Pet. C.A. Br. 1-2; Gov't C.A. Br. 3-4.

Almost immediately after sentence was imposed, Assistant United States Attorney Michael Lang realized that it was erroneous. He notified the judge and defense counsel, and a resentencing was scheduled for January 22, 1991, the earliest available date. Gov't C.A. Br. 4.

At the hearing on January 22, the judge stated that he had erred in the way he had structured the sentence. Defense counsel initially argued that the judge had no authority to increase the length of the sentence on Counts 1 and 36, and that the five-year term imposed on Count 32 was illegal because it constituted an unexplained upward departure from the Sentencing Guidelines level. The judge explained to counsel that he had intended to impose a 12-year prison term and had ordered consecutive terms to reach that result because he had believed that Count

32 charged a pre-Guidelines offense for which a five-year consecutive term had to be imposed.[1]

The judge then gave petitioner an opportunity to discuss the alternatives with his lawyer, including resentencing or permitting the original sentence to stand pending collateral attack, if any, by petitioner. The following then ensued:

> MR. FERRIS: I have explained to Mr. McFerren the ramifications, and he wants to proceed to re-sentence, is what he tells me.
>
> THE COURT: So you are satisfied that we are, as if I had never sentenced him before. That's where we are now. That the prior proceeding is simply wiped out, and that he's before the Court for sentencing.
>
> MR. FERRIS: Is that what you want to do, Mr. McFerren?
>
> DEFENDANT McFERREN: Yes, sir.

Resent. Tr. 8. The judge then sentenced petitioner to concurrent terms of imprisonment of 12 years on Count 1, 27 months on Count 32, and 5 years on Count 36.[2] Resent. Tr. 9-10.

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[1] The judge apparently believed that Count 32 charged petitioner with carrying a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c), which would have required imposition of a five-year consecutive sentence. In fact, Count 32 charged petitioner with being a felon in possession of firearm, in violation of 18 U.S.C. 922(g), which did not require a consecutive sentence and which was subject to the Guidelines.

[2] The judge also ordered petitioner to serve two years of supervised release. Resent. Tr. 9. Petitioner does not specifically attack the addition of the supervised release term on

2. On appeal, petitioner argued that the district court had no authority to resentence him, but that the court of appeals should vacate the five-year sentence originally imposed on Count 32 because it constituted an unexplained upward departure from the 27-36 month Guidelines range for that offense. Petitioner claimed that the pre-Guidelines version of Fed. R. Crim. P. 35 (which governed sentencing on Counts 1 and 36) did not give the district court authority to increase the sentence on Count 1 from 7 to 12 years' imprisonment and on Count 37 from 27 months' to 5 years' imprisonment, and that the Double Jeopardy Clause prohibited the increases. The pre-Guidelines Rule 35(a) provided that "[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." According to petitioner, the sentences originally imposed on Counts 1 and 36 were not "illegal" or "imposed in an illegal manner" because the terms of imprisonment specified were within the statutory maximums. In an unpublished order, the court of appeals affirmed the sentences imposed at the January 22 resentencing. Pet. App. 14.

ARGUMENT

Petitioner argues that the district court's exercise of jurisdiction to resentence him constituted a retroactive application of Rule 35(c),[3] in violation of

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resentencing. See *United States* v. *Strozier*, 940 F.2d 985, 986-988 (6th Cir. 1991).

[3] Rule 35(c), which took effect on December 1, 1991, provides that "[t]he court, acting within 7 days after the imposition of sentence, may correct a sentence that was

the Ex Post Facto Clause of the Constitution, Art. I, § 9, Cl. 3. Pet. 10. He also argues that the district court had no subject matter jurisdiction at the time of resentencing and that he unknowingly waived what he terms a "nonwaiveable jurisdictional defect." Pet. 11.

1. Initially, petitioner errs in his assertion (Pet. 10) that the court of appeals determined that the sentencing judge's exercise of jurisdiction at the time of resentencing was founded upon Rule 35(c). The Sixth Circuit's one-page, two-paragraph opinion does not mention that Rule. Nor did the government's brief in the court of appeals. Instead, the government's brief argued that petitioner had waived any objection to his resentencing, Gov't C.A. Br. 7-8, and that a court has inherent authority, consistent with the Double Jeopardy Clause, to correct a defect in sentencing before the defendant has acquired a reasonable expectation of finality in his sentence, Gov't C.A. Br. 9-16. See *United States* v. *DiFrancesco*, 449 U.S. 117 (1980). The government specifically stated that "Rule 35 is inapplicable to this case." Gov't C.A. Br. 11 n.3.

Even if Rule 35(c) had been invoked to justify petitioner's resentencing, there would have been no violation of the Ex Post Facto Clause. The Ex Post Facto Clause prohibits

> any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense

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imposed as a result of arithmetical, technical, or other clear error."

> available according to law at the time when the act was committed.

Beazell v. *Ohio*, 269 U.S. 167, 169-170 (1925); see *Collins* v. *Youngblood*, 497 U.S. 37, 42-43, 52 (1990).[4] It does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *Beazell*, 269 U.S. at 171; see *Collins*, 497 U.S. at 46. Rule 35(c) does not alter the definition of a crime, the prescribed punishment for a crime, or any defense available in a criminal prosecution. It simply codifies a procedural device recognized by prior practice, in accordance with which a district court could correct an erroneous sentence. Cf. *United States* v. *Himsel*, 951 F.2d 144, 146-147 (7th Cir. 1991); *United States* v. *Carr*, 932 F.2d 67, 71 n.5 (1st Cir.), cert. denied, 112 S. Ct. 112 (1991). Accordingly, applying the new Rule 35(c) to petitioner's resentencing would not have violated the Ex Post Facto Clause.

2. Contrary to petitioner's contention, the sentencing judge did not exercise jurisdiction over petitioner at resentencing solely because he consented. The general power of a court over its own civil and criminal judgments has long been acknowledged to extend beyond the time the judgment is entered or service of the sentence is commenced. See *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 167 (1874). District

[4] *Beazell* and *Collins* did not involve the Ex Post Facto Clause applicable to the federal government; instead, they involved the parallel Ex Post Facto Clause applicable to the States, Art. I, § 10, Cl. 1. The two clauses, however, have always been interpreted to embody identical substantive standards.

courts may act "promptly to correct their own alleged errors," to avoid "imposing added and unnecessary burdens on the courts of appeals." *United States* v. *Dieter*, 429 U.S. 6, 8 (1976). Accordingly, there is no doubt that the district court had jurisdiction to resentence petitioner, and petitioner's consent simply waived any objection he might have asserted to nonjurisdictional defects in the resentencing.

In *United States* v. *Cook*, 890 F.2d 672, 674-675 (4th Cir. 1989), the court of appeals recognized that a district court has inherent power to correct an acknowledged and obvious mistake, at least as long as the defendant has no reasonable expectation of finality. The Fourth Circuit limited the period of non-finality to the time within which either party could file a notice of appeal. *Id.* at 675. In *United States* v. *Rico*, 902 F.2d 1065, 1067-1068 (2d Cir.), cert. denied, 498 U.S. 943 (1990), in circumstances remarkably similar to those of this case, the court agreed with *Cook* that a sentence that deviated from a plea agreement could be adjusted by the trial judge sua sponte within the period allowable for filing a notice of appeal. Accord *United States* v. *Strozier*, 940 F.2d 985 (6th Cir. 1991); *United States* v. *Smith*, 929 F.2d 1453, 1457 (10th Cir.), cert. denied, 112 S. Ct. 146 (1991); *United States* v. *Uccio*, 917 F.2d 80, 84 (2d Cir. 1990); *United States* v. *Lundien*, 769 F.2d 981 (4th Cir. 1985), cert. denied, 474 U.S. 1064 (1986); *United States* v. *Lopez*, 706 F.2d 108 (2d Cir. 1983); cf. *United States* v. *Greenwood*, 974 F.2d 1449, 1470 (5th Cir. 1992), petition for cert. pending, No. 92-7513 (filed Feb. 1, 1993).

United States v. *Howard*, 902 F.2d 894, 897 (11th Cir. 1990), *United States* v. *Minor*, 846 F.2d 1184, 1187

(9th Cir. 1988), and *United States* v. *Henry*, 709 F.2d 298 (5th Cir. 1983) (en banc), are not to the contrary, since none of those cases concerned a trial court's authority to correct its own errors before the defendant obtained a reasonable expectation of finality in the sentence. In *Henry*, a trial court attempted to resentence a defendant five years after the sentence was originally imposed, see 709 F.2d at 301-302, and in *Minor*, the trial court attempted to increase a valid sentence four years after it had been imposed because convictions (and sentences) on related counts had been overturned on appeal, see 846 F.2d at 1185-1186. *Howard* involved a district court's attempt to impose a sentence on a defendant under the Guidelines while reserving decision indefinitely on the government's motion under Sentencing Guidelines § 5K1.1 to depart downward because the defendant had provided substantial assistance in the investigation or prosecution of others. The Eleventh Circuit held that to permit a district court to reserve decision in that manner would be to give it indefinite authority to resentence a defendant whenever it chose to rule on the § 5K1.1 motion. The decision in *Howard* thus has no bearing on the jurisdictional issue raised here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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